NO. 83-1209

in the

Supreme Court

of the

United States

ANGORA ENTERPRISES, INC.,
and JOSEPH KOSOW,

Petitioners,

vs.

BENJAMIN COLE and MIRIAM
COLE his wife, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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INTRODUCTION

Respondents, BENJAMIN COLE, et al., hereby file this Brief in Opposition to Petitioners' Petition for Writ of Certiorari to the Supreme Court of Florida. References to the Appendix to the Petition for Writ of Certiorari are prefixed by the symbol "App.". References to the Appendix to this Brief in Opposition are prefixed by the symbol "R.A.".

STATEMENT OF THE CASE AND FACTS

Petitioners' Statement of the Case is accurate, but disjointed. The relevant procedural events in this dispute are not as simple as Petitioners make them seem.

After the trial court granted Petitioners' motion to disburse funds deposited in the registry of the court, pursuant to §718.401(4), Fla. Stat., Respondents took an interlocutory appeal. Later, upon the trial court dismissing the count of Respondents' Fourth Amended Complaint which is at issue sub judice, for failure to state a cause of action, another appeal was taken. The two were consolidated.

The Florida Fourth District Court of Appeal, while reversing the trial court in relevant part, certified four issues to the Florida Supreme Court. (App. 15-23). The Florida Supreme Court affirmed the District Court of Appeal, and expressly "approved its decision. (App. 14).

Upon denying Petitioners' Motions for Rehearing and for Clarification (App. 5-6), the Supreme Court, on

October 27, 1983, issued its Mandate, remanding the case to the trial court.

Six days later, on November 2, 1983, Petitioners filed a separate Complaint for Declaratory Relief in the United States District Court for the Southern District of Florida, seeking a declaratory judgment on the very same issue they bring before this Court. (R.A. 1-5).

As paragraph 7 of the Complaint for Declaratory Relief alleges, in relevant part:

> . . . the case has never, at the trial stage, progressed to the stage of ANGORA or KOSOW filing an answer to the ASSOCIATION's claim that the escalation clause of the contract is void under §718.401(8), by virtue of the "incorporation clause".

This is accurate to the extent that, as of the time of the filing of the Complaint for Declaratory Relief, Petitioners (as defendants) had not yet been required to file their answer to that count of the Complaint.

On January 23, 1984, the instant Petition for Writ of Certiorari was docketed in this Court.

On February 22, 1984, Petitioner (Defendant) KOSOW finally served his Answer to Amendment to Sixth Amended Complaint. (R.A. 8-12). Petitioner (Defendant) ANGORA had previously filed an Answer adopting and incorporating the allegations and affirmative defenses of KOSOW. (R.A. 6-7).

While this Petition for Writ of Certiorari arises from an appeal from an Order granting a motion to dismiss under the Florida equivalent of Rule 12(b)(6), Fed.R.Civ.P., both Florida appellate courts took notice of certain facts which are not apparent from the face of their decisions, but are revealed throughout the 9-year old record amassed in this case.

First, the Lakeside Village Condominium complex consists of a total of 766 condominium units. Second, the condominium documents at issue were drafted by an attorney. Finally, Petitioners have, at all times during this litigation, been represented by well-known and highly respected counsel. For example, before the Florida Supreme Court, Petitioner KOSOW was represented by Chesterfield Smith, the former President of the American Bar Association. *Angora Enterprises, Inc. v. Cole*, 439 So.2d 832 (Fla. 1983).

ARGUMENT

I.

THIS COURT SHOULD DECLINE JURISDICTION FOR LACK OF A FINAL JUDGMENT OR DECREE.

The two appellate decisions from which Petitioners seek review reversed a dismissal for failure to state a cause of action (claim upon which relief may be granted). These opinions, while they may constitute the law of the case, are in no sense "final judgments"; they are merely approvals of Respondents' pleadings. The result of the decision of the Florida Supreme Court was merely that Petitioners had to file an answer to the Complaint.

On this basis alone, this Court should decline jurisdiction. 28 U.S.C. §1257; *O'Dell v. Espinoza*, 456 U.S. 430 (1982); *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621 (1981).

II.

PETITIONERS HAVE WAIVED THEIR RIGHT TO SEEK REVIEW ON THE QUESTION PRESENTED.

The controversy between the parties is currently being litigated in three forums, including this one. No one, and no time limitation, forced the Petitioners to file suit in the United States District Court. It was a purely voluntary move on their part, notwithstanding the fact that it is an attempt at an "end run" around the existing lawsuit. Still, the suit has been filed, and Petitioners have been vigorously maintaining therein that the issue they seek to have this Court review was not decided by the Florida Supreme Court. Regardless of Respondents' position (that the Florida Supreme Court did decide the issue), Petitioners cannot have it both ways. By filing suit in the United States District Court, they must be deemed to have waived their right to file the instant Petition for Writ of Certiorari, which takes a completely inconsistent position from that being advanced in the District Court.

Back in the Florida trial court, however, Petitioners have taken a position inconsistent with the one they take before this Court: they have not pled the affirmative defense which (on page 6 of their Petition), they complain they have never had the opportunity to assert.

Under Florida practice, Petitioners are deemed to have waived this defense by not pleading it in their Answer. Rules 1.110(c), (d), and 1.140(h) Fla.R.Civ.P.; *e.g.*, *Sottile v. Gaines Construction Co.*, 281 So.2d 558 (Fla. 3d DCA 1973). Yet, their Petition for Writ of Certiorari argues, on page 6, that this affirmative defense of "no knowing and intelligent waiver" is one which was not properly before the Florida appellate courts. Petitioners take the same position in the United States District Court, arguing that to the extent the Florida courts have decided this issue, they have been denied a full and fair hearing on the merits. Yet, when the time finally came for them to plead their affirmative defenses in the trial court, they did not raise the issue. All of the grounds for their now unsuccessful motion to dismiss have been repeated,[1] and they have raised a number of new affirmative defenses, but they have not raised the issue they seek to have this Court decide.

Accordingly, Petitioners may not continue to ask this Court to reverse the Florida courts on an issue which is not part of Petitioners' case. This is not a case of "failing to raise the issue below", rather, it is a case of raising the issue and then dropping it.

Under the circumstances, no case or controversy exists anymore. The issue has become moot by Petitioners' own actions.

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[1]A questionable, but very common, practice under the Florida Rules of Civil Procedure.

III.

PETITIONERS ARE JUDICIALLY ESTOPPED FROM SEEKING A WRIT OF CERTIORARI.

While Respondents recognize that the doctrine of judicial estoppel is generally restricted to situations where the party asserting the earlier contrary position there prevailed on that position, it is submitted that application of the doctrine is appropriate in the case at bar, where Petitioners are taking three different positions in three different courts. As the Fourth Circuit Court of Appeals recently noted, the essential function and justification of the doctrine is:

> . . . to prevent the use of "intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice".

Allen v. Zurich Insurance Company, 667 F.2d 1162, 1167 (4th Cir. 1982).

Judicial estoppel does not involve "pleading in the alternative" in the same forum; that is a permissible practice, as the court may evaluate the conflicting claims and reach a result which is internally consistent. Instead, the doctrine is applied in circumstances such as these to prevent the party from "playing fast and loose" with the courts, and to protect the essential integrity of the judicial process. *Allen*, *supra*, at 1166; *Scarano v. Central R. Co.*, 203 F.2d 510, 512-513 (3rd Cir. 1953); *Selected Risks Insurance Co. v. Kobelinski*, 421 F. Supp. 431 (E.D. Pa. 1976).

If Petitioners' filing of the Complaint for Declaratory Relief in the United States District Court may be characterized as an "end run", then their advancing an issue in this Court which they have waived in the trial court may only be characterized as a "flea flicker", in which they present an issue to this Court which they intentionally fumbled in the trial court.

IV.

THE DECISIONS OF THE FLORIDA COURTS ARE NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

The Florida courts have announced no rule of law contrary to this Court's standard for determining waiver of constitutional rights.

First, the freedom from legislative impairment of contract protected by Article I, §10 is not a fundamental right of the kind subject to the standards urged by Petitioners.

Further, the Florida courts have announced no rule of law contrary to this Court's standards for waiver of constitutional rights. To the contrary, the decisions are consistent with this Court's decision in *D. H. Overmyer, v. Frick Co.*, 400 U.S. 174 (1972). In *D. H. Overmyer, supra*, one party was trying to avoid the effect of a negotiated and bargained-for contract provision drafted by his own attorneys. This Court noted that where a contract is one of adhesion, with great disparity in bargaining power, and where the debtor receives nothing for his waiver, then other consequences might ensue; however, under the circumstances of that case

there was a valid waiver of the defendant's due process right of notice and opportunity to be heard.

The instant case goes even beyond *D. H. Overmyer, supra*, in that it was Petitioner/developer ANGORA which not only drafted the contract, but signed it itself. True, there was no negotiation or bargaining, and the contract is one of adhesion; however, the shoe is on the other foot: it was Petitioner ANGORA who imposed this contract on the Respondents. Further, as is clear from the decisions of the Florida courts, the Petitioners knew full well they were agreeing to be bound by future legislation.

Petitioners argue that implying a waiver from the language at issue is improper because the language on its face does not constitute a waiver. The Florida courts, however, have found the disputed contractual language to be unambiguous. As the Fourth District Court of Appeal stated:

> Has the lessor expressly consented to the statute's incorporation into the terms of the contract in the case now before us? We believe the answer is "yes".

(App. 16). The Supreme Court addressed the same question, and reached the same result:

> And to say that the lessor who in his corporate capacity was both the developer and the management firm, did not agree to the terms of the declaration is to refuse to see what is plainly written in black and white.

* * *

> Since the parties had agreed to be governed by amendments to the Act, they therefore agreed to be bound by the purview of this statute.

(App. 12). Petitioners also attempt to belittle this Court's opinion in *United States Mortgage Co. v. Matthews*, 293 U.S 232 (1934). This case remains good law, however, and is directly on point. The attempted distinction between the cases, on the basis that *Matthews* involved a change in a remedy, rather than a substantive right, is without foundation, when dealing with the protection of the Contract Clause. *City of El Paso v. Simmons*, 379 U.S. 497 (1965).

The Contract Clause protects existing contractual relationships, and the rights and responsibilities of contracting parties. *Allied Structural Steel Co. v. Spannaus*, 438 U.S 234 (1978). Thus, when the Contract Clause is invoked, the court must determine the nature and effect of the alleged agreement, and whether it has been impaired. It is for the court to decide what agreement resulted from the language employed. *United States Mortgage Co., supra.* As this Court found in *United States Mortgage*, and as the Florida appellate courts have found in the case at bar, the agreement of the parties was to be bound by future amendments to the governing statutes. Thus, the statutes could not operate to impair any contractual rights or obligations.

This case presents merely a private version of the situation envisioned by Mr. Justice Story in his concurring opinion in *Trustees of Dartmouth College v. Woodward*,

17 U.S. (4 Wheat.) 518, 712 (1819), and subsequently approved of by this Court in operation. *E.g., Greenwood v. Freight Company*, 105 U.S. 13 (1881); *compare, Beronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843).

Petitioners also argue they have had no opportunity to adduce evidence relevant to this issue. But what evidence could they introduce which might relieve them from the provisions of their own contract? Since the Florida courts have found the language to be clear and unambiguous, there is no parol evidence which may be taken to clarify same. So, what other facts could they be talking about? Will they claim coercion or duress? That is doubtful: there was no one "on the other side" to coerce them; they drew these documents themselves.

V.

THE DECISION OF THE FLORIDA SUPREME COURT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The Florida Supreme Court's decision, resting as it did on its prior decision in *Century Village, Inc. v. Wellington E, F, K, L, H, J, M & G Condominium Association*, 361 So.2d 128 (Fla. 1978), rests on adequate and independent state grounds: Florida contracts law. It does not matter that Petitioners have re-worded the issue in this case in an attempt to create a federal question. The issue is, and always has been, one of state contract law.

The progenitor of the "automatic amendment" doctrine as applied to Florida condominiums is *Kaufman*

v. Shere, 347 So.2d 627 (Fla. 3d DCA 1977), *cert. denied*, 355 So.2d 517 (Fla. 1978). In *Kaufman, supra*, neither the trial court nor the appellate court had to reach the constitutionality of retroactive application of the statute prohibiting escalation clauses, for by use of express language adopting and incorporating the Condominium Act *"as it may be amended from time to time"*, the court held the parties contractually agreed to be bound by amendments to the Act enacted in the future. *Id.* at 628 (emphasis in original).

Century Village, supra, expanded on *Kaufman, supra*. There, the Florida Supreme Court was faced with application of another amendment to the Condominium Act (providing for deposit of rent into the registry of the court) to a pre-existing lease. Application of the statute was attacked on the grounds of impairment of the obligation of contract, in violation of Article I, §10 of the United States and Florida Constitutions.

The Supreme Court held that no constitutional question was raised.

> Because we find the appellant in this case, by specific language contained in its Declaration of Condominium, expressly agreed to be bound by all future amendments to the Condominium Act, including, but not limited to Section 711.63(4), we need not reach this constitutional question.

Century Village, supra, at 132. The Century Village declaration of condominium contained the exact same language as the Declaration of Condominium in this case, incorporating by reference the provisions of the

Act, and defining the Act to mean and refer to it *"as the same may be amended from time to time"*. *Id.*, at 133. (Emphasis in original). Thus, the Florida Supreme Court held,

> By express language, the declaration provided for the adoption of future legislative acts as amendment to the original declaration. Thus, the provisions of Section 711.63(4) were specifically incorporated by reference. This holding is consistent with that reached by the Third District Court of Appeal in *Kaufman v. Shere*, ... We therefore hold that because Section 711.63(4) is incorporated by reference as part of the controlling document of Century Village, no constitutional question of impairment of contract is raised.

Id., at 133.

In *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1980), the Supreme Court reached the question it had expressly reserved in *Century Village, supra*: the constitutionality of the "rent deposit" statute, §711.63(4), *renumbered* §718.401(4), Fla. Stat., in light of the Contract Clause. The Court held:

> As applied retroactively, *absent a lessor's express consent to its incorporation into the terms of the contract*, the statute is invalid.

Pomponio, supra, at 782 (emphasis supplied).

Such was the settled Florida case law in the face of which this case arose.

Most of the Florida District Court of Appeal's discussion centered on application of the rent deposit statute. The court, after noting the Florida Supreme Court's decision in *Pomponio, supra*, held there was no constitutional prohibition against application of the statute because of the Petitioners' express consent to the statute's incorporation into the terms of the contract. Thus, in answer to the question, "(h)as the lessor expressly consented to the statute's incorporation into the terms of the contract in the case now before us?", the court answered, "Yes", relying on *Century Village, supra*, where the Florida Supreme Court found that it need not reach the constitutional question because the developer expressly agreed to be bound by all future amendments to the Condominium Act. After noting that the relevant language in the two declarations was "virtually identical", the District Court of Appeal rejected arguments of contract interpretation advanced by Petitioners, and held the statutes applicable and enforceable in the instant case. The Court also rejected Petitioners' arguments that this was not their intent in inserting this clause in the condominium documents.

> However, the developer-lessor should not expect to be able to invoke the "from time to time" language when it suits its purpose to do so and reject it when not to its taste and advantage. The developer-lessor has quite simply been hoisted on its own petard by these particular amendments.

(App. 19).

The Florida Supreme Court, in affirming in all respects, also expressly acknowledged Petitioners'

argument that the escalation clause statute could not have been applied "under" *Fleeman v. Case*, 342 So.2d 815 (Fla. 1976), and rejected the argument by agreeing with the District Court of Appeal that this case was controlled by its earlier decision in *Century Village, supra.*

Therefore, it is clear that the decision of the Florida Supreme Court rests on adequate and independent state grounds: Florida contracts law.

VI.

PETITIONERS' REQUEST FOR CERTIFICATION IS WITHOUT MERIT.

The decision of the Florida Supreme Court is quite clear. Unlike the cases cited on page 11 of the Petition, the Florida appellate courts' opinions show on their face that the decisions rest on adequate and independent grounds of Florida contract law, and that the constitutional issue raised by Petitioners, whether decided or not, was not necessary to the judgment rendered.

CONCLUSION

Based on the foregoing, the Petition for Writ of Certiorari should be denied, without delay.

Respectfully submitted,

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By _____
MARK B. SCHORR

Appendix

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 83-8587-CIV-JCP

ANGORA ENTERPRISES, INC.,
and JOSEPH KOSOW,

Plaintifs,

v.

CONDOMINIUM ASSOCIATION OF
LAKESIDE VILLAGE, INC.,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

(1) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331. Plaintiffs seek a declaratory judgment, pursuant to 28 U.S.C. §§2201-2202, to declare their rights under Article I, §10, the contract clause of the Constitution of the United States, with regard to the validity of a certain provision in a contract existing between the parties.

(2) In 1974, ANGORA ENTERPRISES, INC., a Florida corporation engaged in Condominium development, entered into eleven identical long-term leases of recreational facilities in Palm Beach County, Florida, with the Defendant CONDOMINIUM ASSOCIATION OF LAKESIDE VILLAGE, INC., binding each unit owner to pay a proportional share of the rent on the recreational lease as a common expense of the condominium. The leases all contained a rent escalation clause which was tied to the cost-of-living index, calling

for readjustment at five-year intervals. (See Exhibit A attached.)

(3) The agreement between the parties provided in Article I of the Declaration of Condominium that the provisions of the Condominium Act of the State of Florida, F.S. 711 *et seq.*, are "hereby incorporated by reference and included herein. . .". "Condominium Act" is further defined in the agreement as "the Condominium Act of the State of Florida (F.S. 711 *et seq.*) *as the same may be amended from time to time*". (See Exhibit B attached and hereafter referred to as the "incorporation clause".) At the time of the parties' agreement and execution of the long-term lease, rent escalation clauses were authorized by Chapter 711, Fla.Stats.

(4) In 1977, the Florida legislature enacted §718.401(8), Florida Statutes, declaring escalation clauses to be void. Retroactive application of that added subsection would be violative of Article I, §10, of the Constitution of the United States, and the Florida Supreme Court has so held in *Fleeman v. Case*, 342 So.2d 815 (Fla. 1976).

(5) In 1977, Plaintiff JOSEPH KOSOW purchased the recreation leases from ANGORA for $570,000.00. ANGORA retains an interest in the long-term leases as the mortgagee on the purchase money mortgage, as well as the mortgagor on a first mortgage to First Federal Savings and Loan Association.

(6) In 1977, the Defendant ASSOCIATION sought, *inter alia*, to enforce the §718.401(8) prohibition on escalation clauses by claiming in a lawsuit brought

against the Plaintiffs that the rent escalation portion of the agreement between the parties was void.

(7) The litigation between the parties has resulted in several reported opinions by virtue of trial court dismissals of the ASSOCIATION's various claims, on motions to dismiss filed by plaintiffs. *Cole v. Angora Enterprises*, 370 So.2d 1227 (Fla.4th DCA 1979), *Cole v. Angora Enterprises*, 403 So.2d 1010 (Fla.4th DCA 1981), *Angora Enterprises v. Cole*, ____ So.2d ____ (Fla. 1983). However, the case has never, at the trial stage, progressed to the stage of ANGORA or KOSOW filing an answer to the ASSOCIATION's claim that the escalation clause of the contract is void under §718.401(8), by virtue of the "incorporation clause".

(8) The state court litigation has not presented, reached or addressed the federal constitutional claims presented here, nor have those claims been procedurally available for presentation to the state trial court.

(9) The ASSOCIATION's actions pose an actual case or controversy with the Plaintiffs, insofar as the ASSOCIATION seeks to withhold, and has withheld, payment of any escalated rental monies due under the lease agreement, claiming that the "incorporation clause" set forth in paragraph 3 above rendered the escalation clause provision unenforceable under §718.401(8), Florida Statutes.

(10) Section 718.401(8), Fla.Stats, cannot be retroactively applied to the agreement in issue and its application to the agreement constitutes an unconstitutional legislative impairment of contracts.

(11) The "incorporation clause" in the agreement does not constitute an intentional relinquishment of Plaintiffs' Article I, §10, Constitutional guarantee, and Plaintiffs have not and have never intended to waive or acquiesce in relinquishing their right to be free from legislative impairment of contracts, through the condominium documents or otherwise.

(12) The actions of the Defendant ASSOCIATION are causing economic injury to the Plaintiffs, and threaten to cause continuing economic injury.

(13) A declaration of the federal standard for determining waiver of federally guaranteed constitutional rights, and application of that standard to the dispute now existing between the parties will resolve the uncertainty between the parties and provide them with a declaration of their respective rights, authorized by 28 U.S.C. §2201.

WHEREFORE, Plaintiffs respectfully request that:

(A) The Court assume jurisdiction of this case;

(B) The Court declare that the incorporation clause at issue does not constitute a waiver of the Plaintiffs' Article I, §10, guarantee of freedom from legislative impairment of contracts; and that application of §718.401(8), Fla.Stat., to Plaintiffs' lease would constitute an unconstitutional impairment of contract; and

(C) The Court grant such other relief as it may deem just and proper, including the awarding of costs and attorney's fees.

Respectfully submitted,

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IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY – CIVIL DIV.

CASE NO. 75-574 CA (L) 01 D

BENJAMIN COLE and
MIRIAM COLE, his wife, et al.,
Plaintiffs,

vs.

ANGORA ENTERPRISES, INC.,
a Florida corporation, et al.,
Defendants.

ANSWER OF DEFENDANTS ANGORA ENTERPRISES, INC. and AMERICAN CAPITAL CORP. TO AMENDMENT TO SIXTH AMENDED COMPLAINT

COME NOW the Defendants, ANGORA ENTERPRISES, INC. and AMERICAN CAPITAL CORP., by and through their undersigned attorney, and for Answer to the Amendment to the Sixth Amended Complaint state that they deny each and every allegation contained therein and adopt by reference and include in this Answer all of the Affirmative Defenses previously pled by these Defendants in their Answer served April 29, 1981 as well as all the Affirmative Defenses of the Defendant, JOSEPH KOSOW heretofore and hereinafter filed to the Amendment to Sixth Amended Complaint.

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 9th day of FEBRUARY, 1984, to MARK B. SCHORR, ESQUIRE, P.O. Box 9057, Fort Lauderdale, Florida, 33310, and MAURICE M. GARCIA, ESQUIRE, P.O. Box 650, Hollywood, Florida, 33022.

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA. CIVIL DIVISION

CASE NO. 75-574 CA (L) 01 D

BENJAMIN COLE and
MIRIAM COLE, his wife,

Plaintiffs,

-vs-

ANGORA ENTERPRISES, INC.,
a Florida corporation, et al.,

Defendants.

ANSWER TO AMENDMENT TO SIXTH AMENDED COMPLAINT

Defendant, KOSOW, answers the Amendment to Sixth Amended Complaint and alleges as Follows:

COUNT V

37. Admitted.

38. Defendant realleges his answers to the cited paragraphs.

39. Defendant admits the enactment of the cited statutes subsequent to the execution of the subject Declarations of Condominium and Leases, admit that the Leases contain an escalation clause and deny all allegations of paragraph 39 not expressly admitted.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

AFFIRMATIVE DEFENSES

A. Count V fails to state a claim against the Defendant, JOSEPH KOSOW, and affords Plaintiffs no relief as JOSEPH KOSOW did not submit any of the subject property to condominium ownership. KOSOW is not a signator to any Declaration of Condominium.

B. Count V fails to state a claim for relief for to the extent that KOSOW is bound by the Declaration of Condominium, it specifies the exclusive method of its amendment. Specifically, the Declaration may not be amended without the written approval of the Lessor under the Long Term Lease. KOSOW never agreed in writing to any Amendment to the Lease which would have incorporated subsequently adopted legislative enactments.

C. Count V affords Plaintiffs no entitlement to relief as the Lease is a Lease of separate property and any modification of the obligations of the Declaration of Condominium is distinct and severable from any modifications of the Lease.

D. As an affirmative defense, Defendant asserts that the Lease provides for its exclusive method, to the exclusion of amendment by adoption of subsequent legislative enactments.

E. As an affirmative defense, Defendant asserts that his Lease is not bound by subsequent amendments to Chapter 711, Florida Statutes, for the term "Condominium Act" as defined within the Declaration of Condominium is not a term utilized within the rent or rent adjustment clause of the Long Term Lease.

F. As an affirmative defense, Defendant asserts that the Statute which prohibits cost of living clauses in recreation leases is unconstitutional as violative of the state and federal constitutional guarantees of equal protection under the law. Specifically, the Statute discriminates against this Defendant by prohibiting enforcement of escalation clauses based upon a cost of living formula while failing to impose similar sanctions upon the Government of the United States or the State of Florida or any political subdivision thereof or any agency of any political subdivision thereof. In fact, the Statutes specifically exempt the aforementioned entities.

G. As an affirmative defense, Defendant asserts that the language contained within the Declaration of Condominium submitting specified property to condominium form of ownership pursuant to Florida Statute, et seq. "as the same may be amended from time to time" is ambiguous. Defendant maintains that it was not the intent of the developer in any way to permit the substantive rights of any parties or future condominium unit owners to be affected by the unpredictable, unknown and unfathomable acts of legislative bodies at some future time or in any way whatsoever either affirmatively, negatively, or in any other manner, including but not limited to, the matter raised by the Plaintiffs in their Complaint as amended.

H. As an affirmative defense, Defendant asserts that even if subsequent amendments to the Condominium Act are incorporated into and made a part of the Membership and Use Agreement and Management Agreement, the same are incorporated only to the extent that they are fair and reasonable. The amendment urged by Plaintiffs is neither fair nor reasonable.

I. Plaintiff is estopped from seeking the return of rentals, its members have used and benefitted by the recreation lease and facilities.

J. Plaintiff is estopped from seeking the refund of recreation lease payments as all payments were voluntarily made.

K. Plaintiff is not entitled to relief as Plaintiff has by its voluntary payment of escalated rents placed a practical construction upon the terms and provisions of the lease inconsistent with Plaintiff's theory of automatic statutory amendment.

L. This action is barred by the Statute of Limitations, Laches or both.

M. As an affirmative defense, Defendant asserts that the recreation lease(s) would not have been executed but for the understanding that it contained a cost of living clause which would be honored by the Association and the unit owners and would not be affected by future and unknown legislative acts. The escalation clause was a material, integral and essential portion of the recreation lease. The result urged by the Condominium Association here is clearly a result not intended by the parties and clearly predicated upon a bilateral or unilateral

mistake of fact and/or law. Plaintiffs' action seeks to deprive Defendant of the benefit of his bargain thereby resulting in an unfair and an unintended benefit being conferred upon the Association and the unit owners with a corresponding detriment, inequity and unconscionable result being visited upon the Defendant.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to MARK B. SCHORR, ESQUIRE, Becker, Poliakoff & Streitfeld, P. A., Attorneys for Plaintiffs, Post Office Box 9057, Fort Lauderdale, Florida 33310-9057; and to ROBERT S. LEVY, ESQUIRE, 502 Forum, III Building, 1665 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401 on this 22 day of February, 1983.

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